IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 1569 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ARVINDBHAI L GHIYA

Versus

SHETH RASIKLAL BHUDARDAS

Appearance:

MR ASHOK L SHAH for Petitioners

MR DM THAKKAR for Respondent No. 1

MR SP DAVE Learned APP for Respondent No. 2

CORAM : MR.JUSTICE A.K.TRIVEDI

Date of decision: 05/02/2001

ORAL JUDGEMENT

Heard Mr. A.L.Shah learned advocate for the petitioners.

Rule. Mr. S.P.Dave learned APP waives service of rule of behalf of respondent no.2 - State. Mr. D.M.Thakkar who has appeared for respondent no.1 in response to notice issued vide earlier order dated 25.4.2000 has waived the service for respondent respondent no.1.

1. The petitioners have prayed to quash and set aside the proceedings of Criminal Case No. 541 of 1998 filed by the present respondent no.1 in the Court of learned JMFC, Botad, District - Bhavnagar.

2. The true copy of the complaint is produced at Annexure-A wherein respondent no.1, as a complainant, has averred and contended that present petitioners, who are hereinafter referred to as original accused, were dealing in cotton and cotton seeds had purchased goods from the complainant in the year 1997. That payments were made by different cheques and outstanding dues were sought to be paid by post dated cheques as enumerated in para.3 of the complaint. It is further averred and contended that cheque bearing No. M-20 171065 drawn in the name of complainant on Syndicate Bank, Ahmedabad Branch dated 26.12.1997 for Rs. 1,85,093/- was presented by the complainant through Botad Mercantile Cooperative Bank Ltd. on 24.6.1998. However, on 7.7.1998, said cheque has returned dishonoured with a remarks on the memo that "payment is stopped" and "out of date". It is further averred and contended in the complaint that demand notice dated 20.7.1998 was sent to the accused by RPAD to which a reply dated 25.7.1998 was sent. But as the demand notice was not complied with and false reply has been sent, the complaint has been filed under Section 138 of the Negotiable Instrument Act.

3. Mr. A.L.Shah learned advocate appearing for the petitioners has contended that so far as the petitioner no.2 - Udaybhai B. Ghiya and petitioner no.3 Mahendrabhai L. Ghiya are concerned, they ceased to be the Directors of M/s. Rakesh Spinners Limited, a company registered under the provisions of Company Act, 1956 with effect from 1.12.1997. Thus, petitioner nos. 2 and 3 could not be liable for the cheque which is alleged to have been issued for the outstanding dues of the company on 26.12.1997 as averred and alleged by respondent no.1 in the complaint.

4. It is further averred and contended on behalf of petitioner no.1 that demand notice dated 25.7.1998 issued by respondent no.1 was replied to by the petitioners through his advocate by letter dated 31.7.1998. Copy of

which is produced at Annexure-D. That vide para.5 of Annexure-D, the petitioners have controverted the allegations made in the demand notice vide para.3 by the respondent no.1 and had asserted the facts that the cheque drawn to Syndicate Bank, Ahmedabad Branch was not drawn on 26.12.1997, but it was dated 6.12.1997. It is further stated therein that the said cheque was to be discounted after the written consent of the petitioners and thereby, to ensure that the cheque is presented after the express consent, the instruction of "stop -payment" was given to the bank by the company. However despite no consent given by the company, the respondent no.1 has presented the cheque after correcting the date from 6.12.1997 to 26.12.1997. It is contended by the petitioners in the reply to demand notice that disputed cheque was presented without obtaining a consent. Not only that, but forgery was committed and the cheque originally dated 6.12.1997 was forged so as to make the date 26.12.1997 instead of 6.12.1997. Thus, the said cheque was not a valid negotiable instrument on 27.12.1997 when it was presented for clearing to the bankers of the petitioners. It is urged on behalf of the petitioners that despite such a reply, specifically vide para.5 of letter dated 31.7.1998, the respondent no.1 has filed the impugned complaint which amounts to abuse of the process and as such, deserves to be quashed.

5. Though respondent no.1 has appeared through advocate Mr. D.M.Thakkar pursuant to notice issued vide earlier order dated 25.4.2000, no affidavit in reply appears to have been filed till today to controvert the facts stated in petition and/or to explain and rebut the contentions raised.

6. On scrutiny of papers, it cannot be disputed that the certified copy of form no.32 dated 8.12.1997 (true xerox copy of which is produced with the petition vide page-37) disclose the facts that petitioner nos. 2 and 3 ceased to be the Directors by giving resignation with effect from 1.12.1997. Therefore, in the absence of any averment in complaint, copy of which is produced at Annexure-A, to connect accused nos. 2 and 3 who are petitioner nos. 2 and 3 as drawer of disputed cheque and on account of uncontroverted fact emerging from true xerox copy of form no.32 which is produced at page-37, the impugned complaint is not tenable at law against the petitioner nos. 2 and 3 and thereby, qua petitioner nos. 2 and 3 the complaint is required to be quashed.

Furthermore, petitioner no.1 has contended by raising a specific contention vide paragraphs "C" and "D"

that disputed cheque originally was drawn on 6.12.1997. Thereafter, as decided with the respondent no.1 the said cheques were not to be presented for discounting without the consent of the petitioners. However, the original cheque was corrected so as to make the date of drawing as of 26.12.1997 and was presented by respondent no.1 to his banker. As alleged in the complaint, on 24.6.1998 it was sent for clearing to the banker of the petitioner on 27.6.1998 as apparent from true xerox copy of the memo issued by Syndicate Bank in respect to disputed cheque bearing no. M -20 171065 dated 26.12.1997. That the reasons stated vide column no.6 is out of date. That means that cheque has been presented beyond the period of validity . On the said fact, the submission made on behalf of the petitioners could not be disregarded that provisions of Section 138 of the Negotiable Instrument Act, 1961 (for short "the Act") could not be attracted if a cheque is presented beyond the date of validity and as such, complaint as filed by respondent no.1 in the Court of learned JMFC, Botad vide Criminal Case No. 541 of 1998 is not maintainable on the said count and it deserves to be quashed.

7. The submission urged on behalf of the petitioners in respect to facts regarding alleged forgery before the presentation of the disputed cheque by changing date from 6.12.1997 to 26.12.1997 is fortified by the statement made in the correspondence produced on record, particularly vide Annexure-G, I and J which are letters dated 21.11.1997, 2.12.1997 and 2.12.1997 respectively. That all the letters are of prior date to the date of the disputed cheque and in the said letters the said cheque with the said number and amount is described as of date 6.12.1997. It would be pertinent to note at this stage that the Court would not enter into the detailed facts at this stage, but these facts if construed would corroborate the facts which are emerging from the memo issued by the banker of the petitioners where it is stated that cheque presented is "out of date" and thereby, there cannot be any doubt about the said fact that if the cheque is presented beyond the period of validity and has returned on the ground that it is presented out of date, no offence as prescribed under Section 138 of the Act could be said to have been committed and no complaint for the same could be legal and valid and as such, following orders are passed :-

Petition is allowed. The impugned complaint bearing Criminal Case No. 541 of 1998 pending in the Court of learned JMFC, Botad, District Bhavnagar is hereby quashed and set aside. Rule

to that extent is made absolute.

(A.K.Trivedi,J.)

(vipul)